

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-2150-2151

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A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES ex rel. LARRY C. MOSLEY,
Appellant,

-against-

ERNEST L. MONTANYE, Superintendent,
Attica Correctional Facility,

-----X

UNITED STATES ex rel. DORIS McNAIR,
Appellant,

-against-

FRANCES CLEMENT, Acting Superintendent,
Bedford Hills Correctional Facility,

Respondent.

-----X

BRIEF FOR RESPONDENT-INTERVENOR

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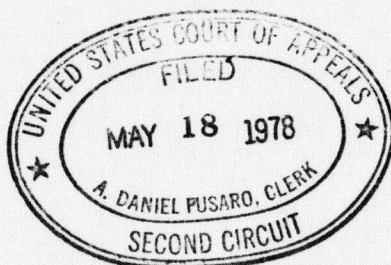


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The Preliminary Statement, a statement of the Questions Presented and the Prior History are each set out in the brief of the New York Attorney General at pages one and two.

We have nothing to add to that presentation.

Point One

Where a state court has ruled on a federal issue, the equitable remedy of habeas corpus in the ordinary case should not be available to a petitioner having the right to a remedy at law by direct appeal.

We urge that appellants herein are not entitled to the relief they request because they failed to take a direct appeal to the U.S. Supreme Court. We do not suggest that the federal courts are without power to grant the relief, but rather that the federal courts should refrain from doing so in the interests of comity and practicality.

There is no question but that each appellant could have appealed directly to the Supreme Court as authorized by 28 U.S.C. §1257 (2) because the only issue in the state courts was the constitutional validity of the entire scheme of the "drug laws" including the sentencing provisions.

By failing to appeal, appellants are attempting to substitute the federal system's equity power for its power at law. This they should not be allowed to do because:

- It increases the time necessary for the litigation to end, without ultimate benefit to any party;
- It causes friction between the state and federal system during the pendency of the action;
- It allows the appellants to litigate the same issue twice without any specific authority to do so.

In Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822 (1963) the Court held that the petitioner was entitled to habeas relief even though he had not sought to appeal his conviction in the state courts. The Court made three specific holdings: (1) That the federal courts had the power to grant relief even though petitioner's state remedies had not been pursued; (2) That the failure to appeal the conviction in the state courts was not a failure to exhaust his remedies; and (3) That by not pursuing his state remedies he had not waived his right to habeas corpus.

Holdings (2) and (3) have to be considered in light of the peculiar problem the federal courts had with petitioner Charles Noia. If the courts followed Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587, then Noia had a cause without a forum. It was not disputed that the confession that convicted him was improperly obtained. Procedurally, however, he could not get a hearing in the state courts, and apparently, on the authority of Darr he was not entitled to a hearing in the federal courts either. What was worse, Noia's codefendants (in the state courts) were entitled to review because of the different procedural posture of their cases, and their convictions had been reversed.

The Supreme Court cut the gordian knot (following the lead of this court, incidentally) by reaffirming that it had the power to grant the relief, and by pointing out that the statutory "exhaustion" requirement (28 U.S.C. 2254) did not affect that power. Rather, the court said, the exhaustion requirement limited the exercise of the court's power in deference to principles of comity.

The central holding in Fay is that the federal courts need not defer to principles of comity where the petitioner had not had, and could not get, a hearing on his federal claim in the state courts. There is no comparison, on the facts, between that case and the present case. Appellants here not only had a full hearing on their federal claim in the state courts, they could have directly appealed to the Supreme Court as of right from the state court decision. 28 U.S.C. 1257 (2); Hicks v. Miranda, 422 U.S. 332, discussion at 343-344, 95 S. Ct. at 2289. Furthermore, Noia was seeking relief on facts applicable only to him. These appellants are attacking a statute with state-wide implications.

There is, therefore, no reason to ignore the principles of comity in this case, as reaffirmed in Preiser v. Rodriguez, 411 U.S. 475, discussion at 491, 93 S. Ct. at 1837.

The State of New York has a continuing interest in validity of the sentencing laws here attacked. What possible purpose is there in introducing an equitable hearing in the federal courts. This is not a case with extraordinary facts or an unusual history. There is no need for a fact finding, except to allow the appellants a chance to forum shop -- to hopefully find a more sympathetic court that will overrule the New York Court of Appeals' holding. Ultimately, the matter will be decided by the Supreme Court. Why then should the federal courts ignore the principles of comity, thereby increasing the federal-state friction, when the game ends in the same square.

In another setting, we were told in Younger v. Harris, 401 U.S. 37, at 43-44, 91 S. Ct. at 750, that courts of equity should not act where there is an adequate remedy at law, and further that courts of equity should defer to the notion of comity. That reasoning should be extended to this case and cases like it.

We urge this court to establish the principle that litigants that are entitled to direct appeal for solution of their problem must use that remedy, and that such litigants are not entitled to invoke equitable remedies except in the most extraordinary circumstances.

Point Two

The imposition of a life sentence for possessing or selling commercial quantities of heroin was neither cruel nor unusual and within the competence of the New York Legislature; such sentence violates no Constitutional rights of defendants.

The appellants have filed a rather lengthy brief detailing their theory as to why New York should not have passed the drug laws under attack (Penal Law Articles 70 and 220, McKinney's Consolidated Laws, Book 39).

Without denigrating their efforts nor minimizing the scholarship evident in the brief, their argument, simply put, is that it is a bad law, based on erroneous penalogical, sociological and medical concepts; that it does not do what was intended, and that the mandatory sentences required are extreme and unconstitutionally severe.

We respectfully urge that the question before this court is not the efficacy of the present law. The issue is whether the state legislature could logically come to an opposite conclusion and then impose the penalties it did.

Naturally, we agree with and rely on the brief submitted by the New York Attorney General on this point (their Point I).

In addition however, we urge the court to examine and adopt the reasoning of another panel of this court in Carmona v. Ward, (decided April 12, 1978), in upholding the same sentencing scheme involved here.

We particularly would point to subpart 'C' starting at page 2663 of the slip opinion.

Respectfully submitted,

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